Southern Alleghenies Disposal Services, Inc. *and* **Donald G. Evans, Sr.** *and* **Chester Hiltabidel.** Cases 6-CA-13268 and 6-CA-13275

June 23, 1981

DECISION AND ORDER

On January 21, 1981, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. The Administrative Law Judge found that Respondent was not engaged in commerce within the meaning of the Act, and he consequently dismissed the complaint here on jurisdictional grounds. The General Counsel excepts to this finding and contends that Respondent is subject to the Board's jurisdiction. We agree with the General Counsel.

The record evidence shows that Respondent is engaged in the business of collecting and disposing of garbage and in the operation of sanitary landfills. Respondent entered a contract, effective January 1 to December 31, 1980,[2] with the city of Johnstown, Pennsylvania, whereby the city obtained the right to dispose of its refuse at Respondent's landfill in Hollsopple, Pennsylvania. For this service the city agreed to pay Respondent $58,000 in equal monthly installments. The parties stipulated that in calendar year 1980 the city of Johnstown purchased goods and services outside the Commonwealth of Pennsylvania in excess of $500,000.[3]

It is well established that the Board will assert jurisdiction over a nonretail enterprise which has an annual outflow or inflow, direct or indirect, across state lines of at least $50,000. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958). As enunciated by the Board in *Siemons*, indirect outflow refers to sales of goods or services within the State to "users" meeting any standard except solely an indirect inflow or indirect outflow standard. Further, the Board stated that it would continue to define as "users" enterprises which themselves were exempted from the Board's jurisdiction but whose operations were of a magnitude that the Board would assert jurisdiction if they were nonexempt.

Here, although the city of Johnstown is exempt from the Board's jurisdiction under Section 2(2) of the Act, the magnitude of its operations would clearly warrant our assertion of jurisdiction over it if it were nonexempt. Accordingly, because Respondent's sales of services to the city of Johnstown are in excess of $50,000, the indirect outflow standard has been met.[4] We therefore find that it will effectuate the purposes of the Act to assert jurisdiction herein.[5]

2. Assuming, *arguendo*, that the Board did have jurisdiction over Respondent, the Administrative Law Judge alternatively dismissed the complaint on its merits, finding that Respondent did not violate Section 8(a)(3) and (1) of the Act by laying off Donald G. Evans, Sr., and Chester Hiltabidel on February 7. The General Counsel excepts to this finding and contends that Respondent laid off Evans and Hiltabidel because of their union activities in violation of Section 8(a)(3) and (1) of the Act. We again agree with the General Counsel.

The record evidence discloses that at the time of the events in question Respondent employed six employees: Evans and Hiltabidel as bulldozer operators; Gary Fetzer and Lanny Fetzer[6] as truckdrivers; Darwin Fetzer as mechanic; and John Hudson as clerk. All worked under the supervision of Terry Stine.

Around the end of January, Gary Fetzer initiated discussions at work with other employees, including Evans and Hiltabidel, regarding the desirability of union representation, and Hiltabidel volunteered to contact Teamsters Local Union No. 110 (hereafter referred to as the Union). On February 4, Hiltabidel met with Union President Bertilino, who gave him some blank authorization cards to be signed by Respondent's employees. Also that day, Hiltabidel requested and was granted a $1-per-hour raise by Respondent.

At 8 a.m. the next morning, February 5, Hiltabidel met with Evans and Gary Fetzer in Respondent's trailer and told them he had obtained authorization cards.[7] Evans stated he wanted the Union,

[1] The Administrative Law Judge failed to rule on the General Counsel's post-hearing motion to correct the transcript as to a single word. The General Counsel renewed this motion to the Board, and, in the absence of express opposition by Respondent or any apparent prejudice to the position of the parties, we hereby grant the motion.

[2] All dates hereafter are in 1980 unless otherwise noted.

[3] The stipulations provided that the city of Johnstown purchased insurance and pension policies from out-of-state companies in the amount of $383,329 and two firetrucks from an out-of-state company in the amount of $145,504.

[4] We thus find it unnecessary to address the General Counsel's alternative argument for assertion of jurisdiction over Respondent based on Respondent's services to other enterprises which are directly engaged in interstate commerce.

[5] We expressly disavow the Administrative Law Judge's characterization of Respondent's operation as a purely local function which does not affect interstate commerce. See *Carroll-Naslund Disposal, Inc.*, 152 NLRB 861 (1965); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977).

[6] Lanny Fetzer began employment on February 4.

[7] Hiltabidel left the authorization cards in his truck to avoid detection by Respondent.

and Gary Fetzer said he would sign a card. At this time Darwin Fetzer entered the trailer, and Gary Fetzer told him that they were going to "get the Union." Darwin Fetzer responded that he did not care about the Union because he was going to get another job. The meeting lasted approximately 5 minutes.

Two days later, on February 7, when Hiltabidel and Evans arrived at work, they were met by Supervisor Stine and an unidentified individual from Respondent's home office in Monroeville, Pennsylvania. Stine informed the two employees that they were laid off and handed them their paychecks. Neither employee had received any prior notice of a layoff. The individual from Monroeville stated that the reason for the layoff was a lack of "roll-off" business.[8] Stine stated that Gary Fetzer would be laid off the next day. In response to a question, both of Respondent's officials made clear that the layoffs were not due to anything the employees had done wrong. Evans asked if he and Hiltabidel would be recalled, and Stine indicated that they might be recalled in April or May. Hiltabidel asked if he and Evans should go to work since their paychecks included a full day's pay for that day. Stine replied that they should go home without working.

Stine testified that he had heard rumors of union activity at Respondent's facility prior to the February 7 layoffs. In addition, Gary Fetzer testified that, before he was laid off at his own request on February 8, Stine asked him if he "had intended to go union." Fetzer answered, "I had intended to go union also." On February 27, Respondent hired a new employee, Rick Marsh, as a driver. Respondent did not offer Hiltabidel or Evans that job, nor has it made any offers of recall to them.

Upon this record the Administrative Law Judge concluded that the General Counsel had not made a *prima facie* showing that Hiltabidel's and Evans' union activities were a motivating factor in Respondent's decision to lay them off. We disagree. The General Counsel clearly demonstrated that Hiltabidel and Evans were strong union advocates. Furthermore, we find, contrary to the Administrative Law Judge, that Respondent knew of their union activities. Indeed, Stine admitted that he had heard rumors of union activities prior to the layoffs. Hiltabidel, Evans, and Gary Fetzer were the only union activists in Respondent's small complement of six employees. Stine's brief discussion with Gary Fetzer on the day after the layoffs simultaneously demonstrated his animadversion to unionism and his ignorance of Fetzer's involvement with the Union.[9] It is reasonable to infer from this evidence that Stine must have identified Hiltabidel and Evans as union adherents prior to their layoffs. We so find.

We further find that the precipitate circumstances of the February 7 layoffs warrant drawing an inference of unlawful discriminatory treatment. The layoffs suspiciously occurred just 2 days after Hiltabidel, Evans, and Gary Fetzer met in Respondent's trailer to finalize their decision to seek union representation. Only 3 days before the meeting, Respondent had given Hiltabidel a significant raise, an action indicating that Respondent had no plans to lay him off at that time. Respondent nevertheless did lay off Hiltabidel and Evans on February 7 with such unusual and unexplained haste that they were sent home immediately rather than at the end of a day's work for which they were paid. In significant contrast, Respondent had given affected employees 1 week's notice prior to an October 1979 layoff. Finally, we note that Respondent failed to recall either Evans or Hiltabidel for the truckdriver's position given to new employee Marsh on February 27. Marsh's hiring belied Respondent's previous indication that it would recall the laid-off employees, who were undisputedly qualified to perform the work in question.[10]

Based on the foregoing evidence of union activities by Hiltabidel and Evans, Respondent's knowledge of those activities, the suspicious timing and precipitate implementation of the layoff action, and Respondent's subsequent failure to recall either employee to a job for which he was qualified, we conclude that the General Counsel has made a *prima facie* showing of unlawful motivation. We further find that Respondent has failed either to rebut this showing directly or to demonstrate that it would have taken the same action against Hiltabidel and Evans in the absence of their union activities. Respondent's stated reason for laying off

[8] The Administrative Law Judge incorrectly defined roll-off business as the dumping of refuse at Respondent's landfill by trucks of other companies. To the contrary, the record evidence reveals that roll-off business refers to the dumping of refuse at Respondent's landfill by Respondent's own trucks.

[9] The record revealed that Gary Fetzer had requested a layoff prior to any union activities. Thus, unlike the Administrative Law Judge, we do not view as "curious" the fact that Fetzer was not alleged in the complaint as a discriminatee.

[10] The Administrative Law Judge attached no significance to the failure of recall since at some prior undisclosed time both employees had informed Respondent that they did not wish to be truckdrivers and at the time of their layoffs neither requested a job as a truckdriver. We reject his reasoning. When both employees stated that they did not want to be truckdrivers, they were working as bulldozer operators and were not faced with having to choose between employment as a truckdriver or unemployment. Moreover, their failure to request truckdriver jobs at the time of their layoffs is readily understandable because they were told that truckdriver Gary Fetzer was bring laid off the next day. Thus, neither employee had reason to believe that a request for a truckdriver job would be to any avail. The Administrative Law Judge's extrapolation of this limited failure to request truckdriver jobs into a general admission by them of Respondent's lack of all types of work is completely unsupported by the record.

Evans and Hiltabidel was a lack of roll-off business. However, an examination of Respondent's Exhibit 12 reveals that, whereas Respondent's roll-off business declined by 10 percent between December 1979 and January 1980, it actually increased by over 20 percent between January and February 1980, the month of the layoffs. In addition, because of Respondent's contract with the city of Johnstown, which became effective on January 1, Respondent's landfill dumping accounts[11] doubled in January and tripled in February from its previous monthly levels in 1979. Since Hiltabidel and Evans were responsible as bulldozer operators for burying all garbage brought to the landfill, their work had clearly increased rather than decreased at the time of their layoffs. Accordingly, in the absence of any legitimate economic reason for the layoff action, the inference of wrongful motive established by the General Counsel is left intact. Because a preponderance of the evidence indicates that Respondent laid off Hiltabidel and Evans on February 7 in retaliation against their union activities, we find that Respondent has violated Section 8(a)(3) and (1) of the Act.

3. We agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) of the Act by Supervisor Stine's interrogation of employee Gary Fetzer on February 8. The Administrative Law Judge, however, declined to recommend any Board remedy for this unfair labor practice in the perceived absence of any other violations of the Act. We shall also order Respondent to remedy this 8(a)(1) violation.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Donald G. Evans, Sr., and Chester Hiltabidel in retaliation against their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By interrogating Gary Fetzer about his union activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[11] Landfill dumping accounts refer to the dumping of garbage at Respondent's landfill by trucks belonging to companies other than Respondent.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off Donald G. Evans, Sr., and Chester Hiltabidel because of their union activities, we shall order Respondent to offer Donald G. Evans, Sr., and Chester Hiltabidel immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of earnings or employment benefits that they may have suffered as result of the discrimination against them by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful layoffs to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Southern Alleghenies Disposal Services, Inc., Hollsopple, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or otherwise discriminating against employees for engaging in activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local Union No. 110, or any other labor organization.

(b) Coercively interrogating employees concerning their support of the above-named Union, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

(a) Offer Donald G. Evans, Sr., and Chester Hiltabidel immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings they may have suffered by reason of the discrimination against them in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and benefits due under the terms of this Order.

(c) Post at its Hollsopple, Pennsylvania, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties were represented and afforded the opportunity to present evidence in support of their respective positions, the National Labor Relations Board has found that we have violated the National Labor Relations Act, as amended, in certain respects, and we have been ordered to post this notice and to carry out its terms.

The National Labor Relations Act gives all employees certain rights including the right:

To engage in self-organization

To form, join, or help a union

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from the exercise or any of all of these things.

Accordingly, we give you these assurances:

WE WILL NOT lay off or otherwise discriminate against employees for engaging in activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local Union No. 110, or any other labor organization.

WE WILL NOT coercively interrogate employees concerning their support of the abovenamed Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Donald G. Evans, Sr., and Chester Hiltabidel immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered by reason of our unlawful layoff of them, with interest.

SOUTHERN ALLEGHENIES DISPOSAL SERVICES, INC.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on October 14, 1980, on complaint of the General Counsel against Southern Alleghenies Disposal Services, Inc., herein called Respondent or the Company. The complaint was issued on May 22, 1980, upon charges filed on March 17, 1980, by Donald G. Evans, Sr. (Case 6-CA-13268), and on March 18, 1980, by Chester Hiltabidel (Case 6-CA-13275). The issues presented are whether both these men were discharged in violation of Section 8(a)(3) of the National Labor Relations Act, as amended. Briefs were filed after the close of the hearing by both the General Counsel and Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE LABOR ORGANIZATION INVOLVED

In its answer Respondent raised an issue as to whether, as stated in the complaint, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local Union No. 110, herein called the Union, is a labor organization. The evidence, unquestioned at the hearing, clearly shows, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE BUSINESS OF RESPONDENT

Respondent is in the business of picking up garbage in the streets of Johnstown, Pennsylvania, and carrying it to a place outside of town, where it is dumped into a hole in the ground. This is a paid service it performs for all kinds of customers—hospitals, office buildings, factories, etc. It has, or had, two trucks with which to carry the garbage, and two bulldozers with which to level off the mounds of refuse. Dirt, or soil, is then poured over the refuse and it is leveled off for use one day either for building or for agriculture.

In the beginning of 1980 the Company made a deal with the township of Johnstown whereby the town could have its own street cleaners or garbage removal employees, with their own trucks, and also bring garbage to the Company's property and get rid of it by just dumping it into the hole. For this privilege the township agreed to pay the Company $58,000 a year. The first question raised at this hearing was: How does this local function, if ever there was one, become interstate commerce such as to fall subject to the jurisdiction of this statute?

Among the benefits enjoyed by the employees of the town are dental insurance, life insurance, and a pension plan. The dental insurance is handled through Confederation Life Insurance Co., whose main office is in Chicago, the life insurance through National Life Assurance Company of Canada, whose main office is in Columbus, Ohio, and the pension plan through Aetna Life and Casualty Company, whose main office is in Hartford, Connecticut. For these benefits the town pays annually $62,500, $30,000, and $150,000, respectively. The town also bought two trucks during 1980, each for $72,000; both were made in Elmira, New York. The theory of jurisdiction here is that the city of Johnstown is engaged in interstate commerce, and that, since Respondent does business with the city, it too is engaged in interstate commerce—the often-stated principle of indirect outflow as it were.

To say that the city of Johnstown is engaged in commerce, interstate or intrastate, is a straining of words. It is not in business at all; its existence, in totality, is a municipal, governmental function. Certainly there is no profit motive involved in anything it does. Carried further, in this case one could hardly say anything Respondent does affects interstate commerce, even by the remotest imagination; garbage is garbage, very local stuff. While there is such a thing as being engaged in interstate commerce indirectly, the person, or enterprise, through whom the indirect commerce concept can be said to exist must himself, or itself, exist for that purpose. This is simply not true of the city of Johnstown.

I do not think that the case precedents cited in support of the complaint in this case are apposite. A company which exists to cause mail to move from one city, or State, to another is by its very nature involved in interstate commerce. *Siemons Mailing Service*, 122 NLRB 81 (1958). Therefore, anyone who does business with it, if in a sufficient dollar amount, becomes entangled in that commerce, or trade, so that it can be said, albeit indirectly, to itself have something to do with interstate commerce. The *Oregon Teamsters* case (*Oregon Teamsters' Security Plan Office, etc.*, 119 NLRB 207 (1957)), the General Counsel's principal supporting citation, involved a straight banking operation or business—a form of commerce if ever there was one from time immemorial. The money of the enormous fund involved there was invested and had to earn interest and make a profit, and therefore for that purpose had occasionally crossed state lines. This is equally true of the Seventh Day Adventists. *Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.)*, 140 NLRB 1249 (1963). In that case there was a church involved, and it did not exist, in its ideological essence, for the purpose of making a profit in this world. But the part of its functioning which was involved in the matter before the Board was a purely money-raising operation from all over the country. What the Board called commerce there was the nonreligious component of the organization's *raison d'etre*.

In contrast, while the city of Johnstown sends the insurance premiums to out-of-state central offices, the teeth of its garbage removal personnel are fixed in the city, so that the running of the municipal government can effectively be carried on. I am unable to see how business of any kind, local or not, is in any way involved in this case. If the city itself is not involved in commerce, it cannot be said that the people who charge the city for using its hole in the ground have anything to do with interstate commerce.

I therefore find that Respondent is not engaged in interstate commerce within the meaning of the statute, or of the Board's established standards, and shall therefore recommend that the complaint be dismissed for that reason.

III. ALTERNATIVE FINDINGS; THE ALLEGED UNFAIR LABOR PRACTICES

A. *Section 8(a)(3)*

As stated above, at the time of the events which gave rise to this case, early in February 1980, the Company had two bulldozer operators, two truckdrivers, and a mechanic who serviced the equipment. Over them was Terry Stine, the supervisor.[1] At the start of the day on

[1] While admitting, in its answer, that Stine "occupies a supervisory capacity," Respondent nevertheless questioned his status as an agent of the Company. Again, the evidence shows without question, and I find, that Stine was a supervisor and agent of Respondent within the meaning of the Act.

Thursday, February 7, the two bulldozer operators—Hiltabidel and Evans—were laid off, and told the reason therefor was the lack of roll-off business. Roll-off business means that trucks of other companies carry garbage to the Company's location and dump it on the ground. The work of the dozer operators is to spread it out. The next day, Friday, the Company laid off another employee—Gary Fetzer—one of the truckdrivers.

The complaint alleges that Hiltabidel and Evans were discharged in retaliation for their union activities and that thereby Respondent violated Section 8(a)(3) of the Act. Denying any illegal motive, Respondent asserts affirmatively that its sole reason was a decline in business which necessitated reducing the staff.

The first indication of union activity by any of these employees came towards the end of the day on February 4. Hiltabidel went to the office of the Teamsters and talked to James Bertilino, president of Local 110, who gave him some authorization cards and told him to "get them filled out." Earlier that day Hiltabidel had had a run-in with Supervisor Stine. Hiltabidel testified:

> He [Stine] said why wasn't I running the dozer. And I said look what I have to put up with and there was a mechanical problem with the dozer, it was smoking so bad that you couldn't see when you were running it. I said you can't even get me any more money and he went up, he said I'll get you a raise and he went up to the office and called and he came back down and he told me I was going to get a raise.

At 8 o'clock the next morning, in the company trailer, Hiltabidel talked with three other employees about the idea of a union. The other men were Gary Fetzer, Evans, and Donald Fetzer. No one else was present. Hiltabidel testified:

> I don't recall exactly what was said. I know that I told them I had the cards and Gary said that he wanted to set up a meeting, he wanted to talk to the guys at the union hall and then when Darwin came in he told him that they were going to get the union and Darwin said he could care less because he was going to get another job.

Hiltabidel added that one of the men—Gary Fetzer—said that "he wanted a union," and another man—Evans—said that "he would sign a card." However, the witness then also said that he did not offer the authorization cards to the men or produce them at all, testifying: "I didn't want the Employer to know it and I never took them out of my van."

This is the totality of the evidence on the entire subject of union activity by any of the employees before three men were dismissed and, indeed, even as to any time thereafter. Hiltabidel admitted that he never again mentioned the Union to anybody—employee or boss, and Gary Fetzer testified candidly that he never referred to the Union when talking to any supervisor.

If ever there was a case that could be called an inference theory of illegality, this is it, both with respect to company knowledge of the union activities of the alleged discriminatees and with respect to claimed prohibited motivation. The one related fact that can be called grounds for suspicion is the timing—the discharges occurred 2 days after some men talked for 5 minutes about a union. If the volume of business was too low, why did Respondent not reduce the staff a week earlier or a week or two later? I do not know. However, reliance here upon Board precedent which says pinpointed knowledge of union activity may be inferred from the small size of the plant, or the limited number of employees involved, is misplaced. It is one thing where the union activity is carried on openly, aboveboard, or unconcealed; it is something else where the prosecution's own witnesses prove that the few who thought of the subject at all took pains to keep their sole conversation hidden—as Hiltabidel personally admitted, where they take no overt action at all, even limited to themselves. How can I find that a situation in fact came into being—knowledge by the employer—which the employees themselves were careful to preclude?

Of the many collateral facts, some mentioned below, the one on which the General Counsel relies most strongly as proof of illegal action against these two men merits special comment. Gary Fetzer was laid off on Friday instead of on Thursday like the other two men. While he was working that last day Supervisor Stine asked him "If I had intended to go union, and he answered I had intended to go union also." This is Fetzer's testimony, who also said that he had never mentioned the Union to Stine before. The manager did not contradict this testimony. I find unpersuasive the conclusionary statement in the General Counsel's brief that as to Hiltabidel and Evans there is "the element of knowledge necessarily inherent in Stine's asking Gary Fetzer" this question. That Stine had heard that somebody was talking union is conceded, for he admitted that he had heard "rumors" of union activities before the discharges. However, the question is whether it can be said, from this one quotation, that he had knowledge of Hiltabidel's and Evans' personal involvement. Had Stine asked Fetzer whether he "also" had intended to go union, one might say he already knew who else had gone union; but the word "also" was spoken by the employee, not the manager. What this means is that perhaps Stine already knew, or believed, Fetzer had gone union; but, curiously, Fetzer, who was discharged that very day, is not named in the complaint as an illegal discriminatee!

Decision in any inference case is never reached with absolute certainty, but, considering the record in its entirety, I do not think it can be said that in fact Respondent discharged these two men because of their prounion sentiments. As the Board recently held in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the first question has to be: Has the General Counsel proved a *prima facie* case in support of the complaint? If he has, the burden shifts, and the second question is reached: Has the respondent proved affirmatively that it in fact discharged the employees only for an objective, economic, or other nonillegal reason? In this case, I do not think the second question need be answered, for a *prima facie* case to start with has not been proved. There simply is

not enough probative evidence of either knowledge or animus.

Before reaching the precise contentions said to support the inference of illegal purpose, one major matter deserves comment. This is not a case where the clear falsity of the asserted affirmative defense of just cause strengthens the purport of the case-in-chief. Cf. *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (1966). Respondent asserts that it had to let three people go because there just was not enough work to keep all of them on full time. While the evidence offered by Respondent, largely certain record documents, to prove that claim falls short of being definitively persuasive, the overall picture does lend some support to its defense. Alexander Rangos, manager of another company owned by the same parent corporation which owns Respondent, produced extensive records of payrolls, sales, profits, and losses. As to past hirings they are neither reliable nor understandable. In fact, the witness himself admitted that the documents are by no means clear. Further, in its post-hearing brief Respondent made no attempt to clarify the ambiguity, nor, indeed, to argue from these records with any precision. Nevertheless, turning to the other side of the coin, there is other evidence—largely uncontradicted testimony—showing that Hiltabidel and Evans, dozer operators, were not replaced by anybody after they left. On February 17 a man named Allen Chaplain was hired as a "laborer on the land-fill." This means that he was neither a truckdriver nor a dozer operator. Further, Rangos also testified, and no one contradicted him, that since the February discharges all the dozer operator work has been performed by Supervisor Stine and D. Fetzer, one of the old truckdrivers, on a part-time basis; i.e., these two men had time left over from their regular duties to take care of the diminished dozer work necessary. In addition, there is the further undisputed fact that in October 1979, again because of a "lack of work," the Company fired three employees in a single day.

The coin keeps revolving. On February 27 the Company hired a man named Rich Marsh to work as a truckdriver. If it needed a man so soon after the discharges, why did the Company not recall Hiltabidel and Evans, especially after telling them on February 7 that they would be recalled if needed? The General Counsel makes much of this one fact, i.e., hiring an outsider instead of recalling Hiltabidel, especially in view of the fact that Hiltabidel had been a truckdriver for the Company before switching to dozer operator 7 months before the discharge. In fact, he contends that Stine's failure to offer either Hiltabidel or Evans truckdriver jobs on the day of the discharge is the strongest proof of animus. However—and again the coin keeps revolving—there is uncontradicted evidence, given in the presence of both Hiltabidel and Evans, that they had conveyed a message to the employer, long before the discharges, that they did not want to do any truckdriving work. According to Stine's uncontradicted testimony: "At one time Hiltabidel told me he no longer had wanted to run a truck and Evans asked me not to notify the office that he was able to run a truck." Moreover, had either of these two men believed Respondent was fabricating when it said they were being sent home because there was not enough work, both or at least one would have asked for a job as a truckdriver. Neither one did.

The fact that neither of the men asked for another job is not only an indication that they did not want to be truckdrivers, but also that each realized that there was not enough work for the entire old cadre to do. Further, perhaps a more revealing fact is what appears to have been Hiltabidel's reaction to the supervisor's criticism of him for just sitting around and not working. He complained about not being paid enough. Stine then said that he would raise Hiltabidel's hourly pay by $1. Does an employee who thinks he deserves a raise and quickly gets it go running straight to the Union? Or could it be that Hiltabidel knew there was too little work for everybody, that jobs were at stake, and that he might be one of those chosen to be sent home because of his offensive behavior?

With the related facts on this question of the affirmative defense pointing almost equally in both directions, I cannot say either that Respondent did discharge the two men because of the decline in business, or that it did not dismiss them for that reason. With this, the final decision must rest upon the fact that the General Counsel has not proved a *prima facie* case. As always the test must be whether the unfair labor practice has been proved by a preponderance of the substantial evidence on the record as a whole. *N.L.R.B.* v. *Glen Raven Silk Mills Inc.*, 203 F.2d 946 (4th Cir. 1953) The burden of proof is a positive one, and has not been met here.

There are one or two further contentions which I do not think suffice to satisfy this affirmative burden. Both men were told that they did not have to work that last day, Thursday, although they were paid for the full day. The General Counsel sees evidence of animus in the fact that "they were not permitted to work through Thursday." The men were also paid for what vacation time was due them, which is further proof of intent to retaliate, according to the General Counsel. I think it best not to comment on such arguments. What would the argument be today had the Company refused to give these men their earned vacation pay? Finally, Respondent did not follow strict seniority when releasing them. In October 1979 there had been a similar mass layoff for economic reasons and on that one occasion the Company did make its selection according to seniority. Does this mean that it deviated from an "established practice" in this sole instance, and thereby revealed illegal intent? I am not at all sure; the record does not show what the circumstances of the earlier layoff were. More importantly, both Hiltabidel and Evans occupied the kind of job—dozer operator—for which work was needed less and less. This was a selective basis that could well explain why the Company chose differently this time. Besides, I think it takes more than one instance to establish a practice.

I shall recommend dismissal of the complaint with respect to the discharge of both these men.

B. *Section 8(a)(1)*

I find that, when Supervisor Stine inquired of employee Gary Fetzer on Friday, February 8, whether he had intended to go union, Respondent violated Section 8(a)(1) of the Act. It matters not that Fetzer had already been advised that February 8 was his last day of work. See *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977). However, while this was an unfair labor practice, it was such an isolated occurrence that it does not warrant a full Board finding and the ordering of remedial action.

[Recommended Order for dismissal omitted from publication.]